

ORDINANCE NO. 1295-09

AN ORDINANCE GRANTING PORTLAND GENERAL ELECTRIC A FRANCHISE FOR TEN YEARS TO ERECT, CONSTRUCT, MAINTAIN AND OPERATE WITHIN THE CITY OF TUALATIN AN ELECTRIC LIGHT AND POWER SYSTEM; PROVIDING AN EFFECTIVE DATE; AND REPEALING ORDINANCE NO. 1038-99.

THE CITY OF TUALATIN ORDAINS AS FOLLOWS:

**FRANCHISE AGREEMENT**

This Franchise Agreement grants Portland General Electric Company ("Grantee") a non-exclusive franchise for ten years to erect, construct, maintain, repair, update and operate an electric light and power system within the City of Tualatin ("City"), sets the terms and conditions of the franchise and provides an effective date.

**WHEREAS**, Grantee has been providing electric light and power service within the City; and

**WHEREAS**, Grantee is duly authorized by the Oregon Public Utility Commission ("OPUC") to supply electric light and power within the City; and

**WHEREAS**, the City has the authority to regulate the use of the Public ROW (as defined below) within the City and to establish the terms by which Grantee shall use and occupy the Public ROW;

**NOW, THEREFORE, THE PARTIES AGREE AS FOLLOWS:**

**Section 1. Nature and Term of Franchise.**

(A) The City grants to Grantee and its successors and assigns, subject to the terms and conditions in this Franchise, a nonexclusive franchise to erect, construct, repair, maintain, upgrade and operate an electric light and power system within the City as it now exists or may be extended in the future, including related communication equipment and Grantee Facilities (as defined below). This Franchise includes the privilege to install, repair, maintain, upgrade and operate Facilities necessary for the operation of Grantee's Electric Light and Power System upon, over, along, and across the surface of and the space above and below the streets, alleys, roads, highways, sidewalks, bridges, and other public ways (collectively, "Public ROW"), as well as public utility easements on third party property that have been acquired by the City, dedicated to the City, or on which a preliminary subdivision plat has been approved by the City, and which will be managed by the City thereafter ("PUEs"), for the provision of public utility services within the City as Grantees' Electric Light and Power System now exists or is extended or upgraded in the future. Nothing in this Franchise limits the City from granting others the right to carry on activities similar to, or different from the ones described in this Franchise. The rights granted in this Franchise do not include the right to build or site electric generating facilities or substations in the Public ROW.

(B) This Franchise also includes the privilege to repair, maintain, upgrade and operate Grantee Facilities located in City park property that are existing as of the effective date of this Franchise. Grantee's right to install Grantee Facilities in City park property on or after the effective date of this Franchise, and to repair,

maintain, upgrade and operate such after-installed Grantee Facilities, shall be subject to the City's permitting process. With respect to Grantee Facilities located in City park property existing as of the effective date of this Franchise, and Grantee Facilities installed in City park property on or after the effective date of this Franchise in accordance with the City permitting process, City park property shall be treated the same as the Public ROW for purposes of Sections 4, 6, 7, 8, 10, 12, 14, 16 and 19.

(C) All Grantee Facilities in possession of Grantee currently or during the Term (as defined in Section 2(B)) that are located within the Public ROW are covered by this Franchise and the location and placement thereof is hereby approved for the purposes of this Franchise.. The City may require relocation of Grantee Facilities as permitted by law and specified in Section 8.

## **Section 2. Term and Effective Date.**

**(A) Effective Date.** The effective date of this Franchise shall be thirty (30) days after the City Council passes an ordinance adopting this Franchise and Grantee accepts this Franchise in writing in accordance with Section 25.

**(B) Duration of Franchise.** The term of this Franchise, and all rights and obligations pertaining thereto, shall be ten years from the effective date of the Franchise ("Term") unless renegotiated or terminated as provided in this Franchise. The Term shall automatically renew for an additional ten years after the expiration of the initial Term; unless either party provides

the other party written notice, at least 180 days prior to the expiration of the initial Term, that it does not desire to renew this Franchise.

**(C) Charter and General Ordinances to Apply.** To the extent authorized by law, this Franchise is subject to the Charter of the City of Tualatin, Chapter 74 of the Tualatin Development Code requiring underground utilities in subdivisions or partitions, and state statutes and regulations existing during the Term. Nothing in this Franchise shall be deemed to waive the requirements of the various codes and ordinances of the City regarding permits, fees to be paid that are generally applicable to other similar businesses operating within the City, or the manner of construction.

### **Section 3. Definitions.**

**(A) Captions.** Throughout this Franchise, captions to sections are intended solely to facilitate reading and to reference the provisions of this Franchise. The captions shall not affect the meaning and interpretation of this Franchise.

**(B) Definitions.** For purposes of this Franchise, the following terms, phrases, and their derivations shall have the meaning given below unless the context indicates otherwise. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular number include the plural number. The word, "shall" is always mandatory and not merely directory.

- (1) "City" means the City of Tualatin, Oregon, a municipal corporation, and all of the territory within its corporate boundaries, as such may change from time to time.
- (2) "City Council" means the duly elected legislative body of the City.
- (3) "City Engineer" means the City Engineer of the City or the City Engineer's designee.
- (4) "City Manager" means the City Manager of the City or the City Manager's designee.
- (5) "City Recorder" means the Recorder of the City or the City Recorder's designee.
- (6) "Director of Finance" or "Finance Director" means the Finance Director of the City or the Finance Director's designee.
- (7) "Franchise" means this Franchise Agreement as fully executed by the City and Grantee and adopted by the City Council pursuant to Ordinance No. 1295-09.
- (8) "Grantee" means Portland General Electric Company, an Oregon corporation.
- (9) "Grantee Facility" means any tangible component of Grantee's Electric Light and Power System, including but not limited to any poles, guy wires, anchors, wire, textures, equipment, conduit, circuits, vaults, switch cabinets, transformers, secondary junction cabinets, antennas, communication equipment and other property necessary or convenient to supply electric light and power by Grantee within the City.

- (10) "Grantee's Electric Light and Power System" means all the real property and Grantee Facilities used by Grantee in the transmission and distribution of its services that are located inside the boundaries of the City.
- (11) "Gross Revenues" shall include all revenues derived by Grantee within the City from Grantee's Electric Light and Power System, and includes, but is not limited to, the sale of and use of electricity and electric service, and the use, rental, or lease of Grantees Facilities, after adjustment for the net write-off of uncollectible accounts. "Gross Revenues" do not include proceeds from the sale of bonds, mortgages or other evidence of indebtedness, securities or stocks, or sales at wholesale by one public utility to another of electrical energy when the utility purchasing such electrical energy is not the ultimate consumer. "Gross Revenues" also do not include revenue from joint pole use. For purposes of this Franchise, revenue from joint pole use includes any revenue collected by Grantee from other franchisees, permittees, or licensees of the City for the right to attach wires, cable or other facilities or equipment to Grantee's poles or place them in Grantee's conduits.
- (12) "NESC" means the National Electrical Safety Code.
- (13) "OPUC" means the Oregon Public Utility Commission.
- (14) "Term" has the meaning described in Section 2(B).

- (15) "Person" means any individual, sole proprietorship, partnership, association, corporation, cooperative, People's Utility District, or other form of organization authorized to do business in the State of Oregon, and includes any natural person.
- (16) "Public ROW" has the meaning described in Section 1(A).
- (17) "PUE" has the meaning described in Section 1(A).
- (18) "Year," "annual" or "annually" means the period consisting of a full calendar year, beginning January 1 and ending December 31, unless otherwise provided in the Franchise.

#### **Section 4. Construction.**

**(A) Construction.** Subject to the NESC, Grantee's Electric Light and Power System shall be constructed and maintained in such manner as to not interfere with sewers, water pipes, or any other property of the City, or with any other pipes, wires, conduits or facilities that may have been laid in the Public ROW by or under the City's, County's or State's authority. Grantee and the City shall work together during any design process affecting the Public ROW to establish suitable locations for Grantee's Facilities and minimize cost to both parties. Assuming there is sufficient space in the Public ROW, all poles shall be placed between the sidewalk and the edge of the Public ROW unless another location is approved by the City Engineer. For any land use development in the City requiring Grantee's services, the City shall notify Grantee of such pending land use development and Grantee shall notify the City of Grantee's construction

standards that are provided to the OPUC and NESC requirements that are applicable to the pending land use development. The City shall impose a condition on its land use development approval that the developer either (i) provide a sufficient location in the Public ROW located in the land use development for Grantee Facilities that meet the applicable construction standards and NESC requirements, or (ii) obtain an easement for Grantee Facilities that meet the applicable construction standards and NESC requirements. .

**(B) Acquisition.** Subsequent to the effective date of this Franchise, upon Grantee's acquisition of additional Grantee Facilities in the Public ROW, or upon an addition or annexation to the City of an area in which Grantee retains Grantee Facilities in the Public ROW of such addition or annexation, Grantee shall submit a statement to the City describing all Grantee Facilities involved, whether authorized by a franchise agreement or upon any other form of prior right, together with a map, as described in Section 5, specifying the location of all such Grantee Facilities. Such Grantee Facilities shall immediately be subject to the terms of this Franchise.

**(C) Emergency Repairs.** In the event emergency repairs to Grantee's Facilities are necessary, Grantee shall as soon as reasonably possible notify the City of the need for such repairs. Grantee may immediately initiate such emergency repairs and apply for appropriate permits the next



business day or as soon as reasonably possible following discovery of the emergency.

**(D) Reasonable Care.** All work completed by Grantee within the Public ROW shall be conducted with reasonable care and with the goal of minimizing the risk to those using the Public ROW and to minimize the risk of damage to public and third party property. All work shall be performed in accordance with all applicable laws and regulations, including but not limited to the NESC. Any work completed by Grantee within the Public ROW may be inspected by the City to determine whether it has been placed in its approved location according to Grantee's permit issued by the City. If emergency work has been completed by Grantee in the Public ROW and the City determines such work was not completed in a City approved location, the City shall notify Grantee and provide Grantee with sixty (60) days after the emergency passed to reperform the work in a City approved location in the Public ROW.

**Section 5. Supplying Maps.** Grantee shall maintain maps and data pertaining to the location of Grantee Facilities on file at its corporate offices or at an office in Oregon. After providing Grantee with twenty-four (24) hours prior notice, the City may inspect the maps (excluding Grantee proprietary information) at any time during Grantee's business hours. Upon request of the City and without charge, Grantee shall furnish current maps to the City by electronic data in read-only format showing the general location of Grantee Facilities, excluding Grantee proprietary information. Unless required by law, the City will not sell or provide Grantee prepared maps or

data to third parties without written permission from Grantee. Upon request of Grantee, the City will make available to Grantee any relevant City prepared maps or data at no charge to Grantee.

**Section 6. Excavation.** Subject to Sections 4 and 7, and after obtaining any permits required by the City, Grantee may make all necessary excavations within the Public ROW for the purpose of installing, repairing, upgrading or maintaining Grantee Facilities, except that in the case of an emergency, no permit shall be required prior to excavation. Should there be a direct conflict between any terms or conditions stated in a permit granted by the City and the terms and conditions of this Franchise, the terms and conditions of this Franchise shall control. All excavations made by Grantee in the Public ROW shall be properly safeguarded for the prevention of accidents. All of Grantee's work under this Section shall be completed in strict compliance with all applicable rules, regulations and ordinances of the City. If a customer of Grantee is required to make excavations that are located in the Public ROW pursuant to Grantee's tariff on file with the OPUC, the City agrees that Grantee shall not be responsible or liable for any failure by such customer to comply with any applicable rules, regulations, ordinances of the City and/or with City standards.

**Section 7. Restoration after Excavation.** Except as otherwise provided for in this Section, Grantee shall restore the surface of the Public ROW disturbed by any excavation by Grantee to at least the same condition that it was in prior to excavation. If Grantee excavates the surface of the Public ROW, Grantee shall be responsible for restoration of the Public ROW and the area affected by the

excavation. If Grantee fails to restore the Public ROW to at least the same condition that it was in prior to the excavation, the City shall give Grantee written notice and provide Grantee a reasonable period of time, not to exceed thirty (30) days, to restore the Public ROW. If Grantee's work creates a public safety hazard as determined by the City Engineer, Grantee may be required to repair or restore the Public ROW within twenty-four (24) hours notice from the City, or such time as agreed between the City Engineer and Grantee, taking into consideration weather and other relevant factors. If Grantee fails to make such repairs or restorations within the specified time frames, after providing notice to Grantee and a reasonable opportunity to cure, the City may refill or repave any opening made by Grantee in the Public ROW and Grantee shall pay that expense. The City reserves the right, after providing notice to Grantee, to remove or repair any work completed by Grantee, which, in the determination of the City Engineer is inadequate, using a qualified contractor in accordance with applicable state and federal safety laws and regulations, and Grantee's construction standards as provided to the OPUC and applicable NESC requirements. The cost of such work, including the cost of inspection and supervision, shall be paid by Grantee. If Grantee's work is coordinated with other construction work in the Public ROW, the City Engineer may excuse Grantee from restoring the surface of the Public ROW, provided that as part of the coordinated work, the Public ROW is restored to good order and condition.

#### **Section 8. Relocation.**

##### **(A) Permanent Relocation Required by City and Commission**

**Projects.** This subsection (A) covers permanent relocation of

overhead Grantee Facilities that will remain overhead, and underground Grantee Facilities that will remain underground. When it is necessary or convenient in the interest of the public for a City or a Tualatin Development Commission project, the City has the right to require Grantee to change the location of Grantee's Electric Light and Power System located in the Public ROW, and unless otherwise agreed Grantee shall pay the expenses of the relocation. However, when the City requests a subsequent relocation of all or part of the same Grantee Facilities less than two years after the initial relocation that is necessary or convenient for a public project, and not at the request of or to accommodate a third party, the subsequent relocation shall be at the expense of the City. This Section 8(A) shall not apply if either of the following is true: (1) the project or improvement necessitating the change in location will not be owned by the City or Commission; or (2) the majority of the funding for the project or improvement does not come from the City, state or federal government sources. The City agrees to provide a suitable location in the Public ROW, as mutually agreed, for Grantee Facilities that meets the Grantee's construction standards as provided to the OPUC and NESC requirements. If sufficient space is not available in the Public ROW for Grantee Facilities, the City agrees to obtain sufficient easements from private property owners to accommodate Grantee Facilities in order to maintain service and permit upgrades to Grantee Facilities. If Grantee

fails to remove or relocate such Grantee Facilities within ninety (90) days after the date established by the City, which, except in the event of a public emergency, shall not occur sooner than ninety (90) days after the City provides written notice to remove/relocate to Grantee, the City may cause or effect such removal or relocation, performed by a qualified contractor in accordance with applicable state and federal safety laws and regulations and Grantee's construction standards as provided to the OPUC, and Grantee shall pay that expense. In the event a public project is delayed and could result in damages to the City, City agrees to convene a meeting among all parties who potentially could have caused the delay to discuss who was responsible for the delay. City shall provide notice to Grantee of anticipated damages as a result of a public project delay as soon as reasonably practicable after City has received notice of such anticipated damages. Unless otherwise agreed to by the parties, Grantee will not be liable for any delay damages before the delayed public project is completed. The City shall use commercially reasonable efforts to mitigate any damages it may incur as a result of a delay in the completion of a public project. If the City incurs delay damages as a result of Grantee's negligence or willful misconduct, as determined by the City, Grantee and City agree to negotiate a mutually agreeable settlement with the City. In the event a settlement is not reached between the City and Grantee within ninety (90) days after the

completion of the delayed public project, City may pursue any other remedies at law or equity available to City.

**(B) Notice.** The City will provide as much notice prior to requiring Grantee to relocated Grantee Facilities as is reasonably possible. The notice shall specify the date by which the existing Grantee Facilities must be removed or relocated. Nothing in this provision shall prevent the City and Grantee from agreeing, either before or after notice is provided, to another schedule for relocation. The City and Grantee agree to cooperate in the design phase to minimize the economic impact of such relocation on Grantee and the City.

**(C) Permanent Relocation- Undergrounding.** This subsection (C) applies to conversions of Grantee Facilities from overhead to underground regardless of whether or not such conversion is made in conjunction with a public project. As permitted by, and in accordance with City Ordinance and any applicable law, administrative rule, or regulation, the City may require Grantee to convert any overhead Grantee Facilities to underground Grantee Facilities at the same or different locations, subject to the NESC and Grantee's engineering and safety standards. This subsection does not apply to Grantee Facilities used for or in connection with the transmission of electric energy at nominal voltages in excess of 35,000 volts or to pedestals, cabinets or other aboveground equipment. In the event aboveground equipment must be relocated as part of the conversion of overhead Grantee

Facilities, Grantee agrees to provide City an opportunity to comment on the location and aesthetic design of such aboveground equipment. Such relocation shall be consistent with applicable long-term development plans or projects of the City or Commission, or as approved by the City. Grantee shall pay the expense of such conversion, and Grantee may recover its costs from its customers in accordance with state law, administrative rule, or regulation. The City agrees to provide a suitable location in the Public ROW, as mutually agreed, that meets Grantee's construction standards as provided to the OPUC and NESC requirements and if sufficient space is not available in the Public ROW, then the City will obtain sufficient easements from private property owners to accommodate Grantee Facilities in order to maintain service and permit upgrades of Grantee Facilities. Nothing in this subsection prevents the City and Grantee from agreeing to a different form of cost recovery consistent with applicable statutes, administrative rules, or regulations on a case-by-case basis.

Within sixty (60) days, or as mutually agreed upon by the Grantee and the City, the Grantee shall remove the overhead facilities that have been replaced by underground facilities.

**(D) Temporary Relocation at Request of City.** This subsection (D) covers temporary relocation of overhead Grantee Facilities that will remain overhead, as well as underground Grantee Facilities that will

remain underground. The City may require Grantee to temporarily remove and relocate Grantee Facilities by giving sixty (60) days notice to Grantee. Prior to such relocation, the City agrees to provide a suitable location in the Public ROW, as mutually agreed, that meets the Grantee's construction standards as provided to the OPUC and NESC requirements, or a temporary construction easement that meets the Grantee's construction standards as provided to the OPUC and NESC requirements, and that allows Grantee to place Grantee Facilities on the easement, in order to maintain sufficient service and permit upgrades to Grantee Facilities until such time as the Grantee moves such Grantee Facilities to their permanent location. The City will assist in acquiring easements from private property owners if sufficient square footage is not available in the Public ROW or the City has not obtained construction easements for the public project necessitating the temporary relocation of Grantee Facilities. The cost of temporary removal or relocation of Grantee Facilities that is necessary or convenient for public projects, as well as the cost of replacing Grantee Facilities in their permanent location, shall be paid by Grantee. However, when the City requests a subsequent relocation of all or part of the same Grantee Facilities less than two years after the initial relocation, that is necessary or convenient for a public project and not at the request of or to accommodate a third party request, the subsequent relocation shall be at the expense of the City.



**(E) Permanent Relocation at Request of Third Party.** If a relocation is requested by or is to accommodate a third party, Grantee shall seek reimbursement from the third party and not from the City. Such relocation shall be consistent with any applicable long-term development plan or projection of the City or approved by the City; however, if relocation of Grantee Facilities is caused or required by conditions placed by the City on approval for projects of third parties, such relocation shall in no event fall under the provisions of subsections (A), (C) or (D) of this Section 8. The City and Grantee agree to cooperate to minimize the economic impact of such relocation on each party.

**(F) Temporary Relocation at Request of Third Parties.** Whenever it is necessary to temporarily relocate or rearrange a Grantee Facility in order to permit the passage of a building, machinery or other object, Grantee shall perform the work after receiving sixty (60) business days written notice from the persons desiring to move the building, machinery or other object. The notice shall:

- (1) demonstrate that the third party has acquired at its expense all necessary permits from the City;
- (2) detail the route of movement of the building, machinery, or other object;
- (3) provide that the person requesting the temporary relocation is responsible for Grantee's costs;

- (4) provide that the requestor shall indemnify and hold harmless the City and Grantee from all damages or claims resulting either from moving the building, machinery or other object or from the temporary relocation of Grantee Facilities; and
- (5) be accompanied by a cash deposit or other security acceptable to Grantee for the costs of relocation.

Grantee in its sole discretion may waive the security obligation. The cash deposit or other security shall be in an amount reasonably calculated by Grantee to cover Grantee's costs of temporary relocation and restoration. All temporary relocations under this subsection shall comply with ORS 757.805.

**Section 9. Public ROW Vacation.** If all or a portion of the Public ROW used by Grantee is proposed to be vacated by the City during the Term, the Grantee shall be notified of the pending public hearing for the Public ROW vacation. The Grantee shall notify City if Grantee has facilities in the Public ROW that must be maintained. Unless Grantee and the future owner of the property to be vacated agree on a plan for the relocation of Grantee's Facilities, the City shall impose a condition on the vacation that the property owner provide an easement of Grantee Facilities in their then-current location and that prohibits any use of the vacated property that interferes with Grantee's full enjoyment and use of its easement. . If a condition on the vacation is not reasonably possible and Grantee and the future owner of the property to be vacated have not agreed on a plan for the relocation of Grantee's Facilities located in the vacated Public ROW,

Grantee shall, after notice from the City and without expense to the City, remove Grantee Facilities from such vacated Public ROW, restore, repair or reconstruct the Public ROW where such removal has occurred, and place the Public ROW in good order and condition as may be required by the City. In the event of failure, neglect or refusal of Grantee, after providing Grantee with ninety (90) days prior written notice, to repair, restore, or reconstruct such Public ROW, the City may complete such work or cause it to be completed by a qualified contractor in accordance with applicable state and federal safety laws and regulations, and Grantee shall bear that cost. Upon request, the City will cooperate with Grantee to identify alternative locations within the Public ROW for Grantee Facilities if they are not permitted to remain in the vacated area.

**Section 10. City Public Works and Improvements.** Nothing in this Franchise shall be construed to prevent the City from excavating, grading, paving, planking, repairing, widening, altering, or completing any work that may be needed or convenient in the Public ROW that is consistent with the NESC. The City shall coordinate such work with Grantee to avoid, to the extent reasonably foreseeable, any obstruction, injury or restrictions on the use by Grantee of any Grantee Facilities, and the City shall be responsible for the costs to repair any damage to Grantee Facilities arising out of such work. Nothing in this Section relieves Grantee from its obligations stated in Section 8.

**Section 11. Use of Grantee Facilities.** City shall maintain attachment agreements and permits to string wires on Grantee's poles or run wires in Grantee's trenches and/or conduit for municipal purposes and to attach fire and police alarm and

communication equipment to Grantee's poles, provided that such wires and equipment:

- (a) do not unreasonably interfere with Grantee's operations;
- (b) conform to the NESC; and
- (c) the City's excess capacity on such wires and equipment is not leased to, sold to or otherwise used by non-governmental third parties.

Grantee shall not charge the City for such attachments to its poles or in its conduits; however, the City shall be responsible for paying for any make-ready and inspections Grantee must perform in order to provide access to Grantee Facilities for City wires and equipment in accordance with the NESC. If any of the City's attachments to Grantee Facilities violate the NESC, the City shall work with Grantee to address and correct such violations in an agreed-upon period of time. The City shall indemnify and hold Grantee harmless from loss or damage resulting from the presence of City's wires and equipment on or in Grantee Facilities. For purposes of this Franchise, "make-ready" means engineering or construction activities necessary to make a pole, conduit, or other support equipment available for a new attachment, attachment modifications, or additional facilities.

## **Section 12. Payment for use of Public ROW**

**(A) Use of Public ROW.** In consideration for its use of the Public ROW in accordance with the terms of this Franchise, Grantee agrees to pay the City an amount equal to 3 ½ percent of the Gross Revenue received by Grantee

from its customers within the City. The payment for each year shall be based on the Gross Revenue collected by Grantee during the previous calendar year from Grantee's customers, and shall be paid on an annual basis. To the extent permissible under state law and regulation, the payment imposed by this subsection shall be considered an operating expense of Grantee and shall not be itemized or billed separately to consumers within the City.

**(B) Property Tax Limitations Do Not Apply.** The payment described in this Section 12 is not subject to the property tax limitations of Article XI, Sections 11(b) and 11(19) of the Oregon Constitution and is not a fee imposed on property or property owners by fact of ownership.

**(C) Privilege Tax.** As permitted by Oregon law, the City retains the right, to charge a privilege tax based on a percentage of the Gross Revenue earned from Grantee's customers within the City in addition to the payment amounts set forth in subsection (A). The City shall provide Grantee at least ninety (90) days notice prior to such privilege tax becoming effective. Grantee shall follow state regulations regarding inclusion of such privilege tax as an itemized charge on the electricity bills of its customers within the City.

**(D) Remittance of Annual Payment.** Grantee shall remit the annual 3 ½% franchise fee payment, as well as payment of any additional privilege tax, to the Finance Director on or before the first (1<sup>st</sup>) day of April of each year. Payment shall be made in immediately available federal funds. With its annual payment, Grantee shall provide the City a statement under oath showing the Gross Revenue for the preceding year.

**(E) Acceptance of Payment.** The City's acceptance of any payment due under this Section shall not be a waiver by the City of a breach of this Franchise occurring prior to the acceptance, nor shall the City's acceptance preclude the City from later establishing that a larger amount was actually due, or from collecting the balance due to the City.

**(F) Late Payments.** Interest on late payments shall accrue from the due date based on PGE's cost of debt as approved by the OPUC plus 100 basis points (1%). as of the due date, and shall be computed based on the actual number of days elapsed from the due date until payment. Interest shall accrue without regard to whether the City has provided notice of delinquency.

**(G) No Exemption From Other Fees or Taxes.** Payment of the amounts described in this Section 12 shall not exempt Grantee from the payment of any other license fee, tax or charge on the business, occupation, property or income of Grantee that may be lawfully imposed by the City or other taxing authority, except as may otherwise be provided in the ordinance or laws imposing such other license fee, tax or charge.

**(H) Direct Access and Volumetric Methodologies.** Consistent with state law, the City may direct that the payments made under this Section 12 be based on volume-based methodologies as specifically described in ORS 221.655 instead of the formula set out in subsections 12 (A) and (C). Notice must be given to Grantee in writing for the subsequent payments to be made using volume-based methodology. The volumetric calculation shall apply to payments made in one calendar year (based on January 1 to December 31

billings from the previous calendar year). The choice to use volumetric methodology must be renewed annually by the City. No notice is necessary if the City chooses to remain on the revenue-based calculation.

- (I) Payment Obligation Survives Franchise.** If the parties do not finish negotiation of a new franchise agreement prior to the expiration of this Franchise, the obligation to make the payments impose by this Section 12 shall survive expiration of this Franchise until a new franchise agreement becomes effective and supersedes this Franchise. If this Franchise is terminated before expiration, Grantee shall make the remaining payments owed, if any, within ninety (90) days of the termination date.

### **Section 13. AUDIT.**

- (A) Audit Notice and Record Access.** The City may audit Grantee's calculation of Gross Revenues. Within ten (10) business days after receiving a written request from the City, or such other time frame as agreed by both parties, Grantee shall furnish the City and any auditor retained by the City: (a) information sufficient to demonstrate that Grantee is in compliance with this Franchise; and (b) access to all books, records, maps and other documents maintained by Grantee with respect to Grantee Facilities that are necessary for the City to perform such audit. Grantee shall provide access to such information to City within the City, or the Portland, Oregon metropolitan area, during regular Grantee business hours.

**(B) Audit Payment.** If the City's audit shows that the amounts due to the City are higher than those based on the Grantee's calculations of Gross Revenue, then Grantee shall make a payment for the difference within sixty (60) days after the deliver to Grantee of the audit results. In addition to paying any underpayment, Grantee shall pay interest at the prevailing annual average yield of the State of Oregon's local government investment pool (also called the Oregon Short-Term Fund – OSTF), but not penalties, as specified in this Franchise, from the original due date. If the City's audit shows that Grantee's calculation of Gross Revenue resulted in an overpayment to the City by five percent (5%) or more in any one year, the Grantee may deduct such overpayment from the next annual franchise fee payment. If the City's audit shows that the amounts due to the City based on the Grantee's calculation of Gross Revenue deviated by five percent (5%) or more in any one year from the City's calculation during the audit, Grantee shall reimburse City for the cost of the audit, not to exceed one percent (1%) of the total annual franchise payment for the applicable audit period.

#### **Section 14. TERMINATION AND REMEDIES.**

**(A) By City for Cause.** If Grantee ceases to maintain Grantee Facilities in accordance with the maintenance commitments outlined in the Service Quality Measures review filed with the OPUC, and this causes an increase in the risk to the public of personal injury or property damage, the City shall notify Grantee. Grantee shall have thirty (30) days after



the date of the notice to eliminate such risk or, if such risk can not be eliminated within thirty (30) days, such reasonable time period as is required to eliminate such risk. Grantee shall bear all costs related to remedying the risk. If Grantee does not eliminate the risk in accordance with the preceding sentence, the City may then terminate this Franchise by providing Grantee written notice of termination.

**(B) By City if City Will Provide Service.** The City may terminate this Franchise upon one year's written notice to Grantee if the City decides to engage in public ownership of the electric facilities located in the Public ROW and the public distribution of electric energy to customers throughout the City in accordance with ORS 758.470.

**(C) City Reserves Right to Terminate.** In addition to any other rights provided for in this Franchise, the City reserves the right, subject to subsections 14(E) and (F), to terminate this Franchise in the event that:

- 1) The Grantee materially violates a material provision of this Franchise;
- 2) The Grantee is found by a court of competent jurisdiction to have practiced any material fraud or deceit upon the City;
- 3) There is a final determination that Grantee has failed, refused, neglected or is otherwise unable to obtain or maintain Grantee's service territory designation required by

- a federal or state regulatory body regarding Grantee's operation of Grantee's Electric Light and Power System; or
- 4) Grantee becomes unable or unwilling to pay its debts, or is adjudged bankrupt.

**(D) Material Provision.** For purposes of this Section 14, the following are material provisions of this Franchise, allowing the City to exercise its rights under this Section 14 or as set forth elsewhere in this Franchise:

- 1) The invalidation, failure to pay or suspension of Grantee's payments of franchise fees or privilege taxes to the City for use of the Public ROW under this Franchise;
- 2) Failure by Grantee to submit timely reports as may be requested by the City, regarding the calculation of its franchise fees or privilege taxes paid or to be paid to the City;
- 3) Failure by Grantee to maintain the liability insurance or self insurance required under this Franchise;
- 4) Failure by Grantee to provide copies of requested information as provided under Sections 4, 5, and 13 above; and
- 5) Failure by Grantee to otherwise substantially comply with the requirements of Section 4 through Section 20 of this Franchise, unless otherwise agreed.

**(E) Notice and Opportunity to Cure.** The City shall provide Grantee thirty (30) days prior written notice of its intent to exercise its rights under this Section 14, stating the reasons for such action. If Grantee cures the basis for termination or if the Grantee initiates efforts satisfactory to the City to remedy the basis for termination and the efforts continue in good faith within the thirty (30) day notice period, the City shall not exercise its remedy rights. If Grantee fails to cure the basis for termination or if the Grantee does not undertake and/or maintain efforts satisfactory to the City to remedy the basis for termination within the thirty (30) day notice period, then the City Council may impose any or all of the remedies available under this Section 14.

**(F) Remedies.** In determining which remedy or remedies are appropriate, the City shall consider the nature of the violation, the person or persons burdened by the violation, the nature of the remedy required in order to prevent further such violations, and any other matters the City deems appropriate. Nothing in this subsection shall be construed to limit the City's authority to pursue any legal remedy it deems appropriate.

**(G) Financial Penalty.** In addition to any rights set out elsewhere in this Franchise, as well as its rights under the City Code or other law, the City reserves the right at its sole option to impose a financial penalty of up to \$500.00 per day per material violation of a material provision of this Franchise when the opportunity to cure has passed.

**Section 15. ASSIGNMENT OF FRANCHISE.** Grantee shall not sell, assign, transfer, or convey this Franchise to a third party without the City Council giving its consent in a duly passed ordinance. Upon obtaining such consent, this Franchise shall inure to and bind such third party. Grantee shall not sell or assign this Franchise to an entity that is not authorized by the OPUC to provide electric service to retail consumers under Oregon law. Prior to any proposed transfer, Grantee shall be in full compliance with this Franchise and the proposed transferee shall agree in writing to be bound by this Franchise. In the event Grantee is purchased by or merged into another entity and Grantee survives such purchase or merger as a public entity, Grantee shall provide notice to the City of such purchase or merger, but shall have no obligation under this Franchise to obtain the consent of the City Council for such purchase or merger.

**Section 16. REMOVAL OF FACILITIES.** If this Franchise is terminated or expires on its own terms and is not replaced by a new franchise agreement or similar authorization, the City may determine whether Grantee Facilities are to be removed from the Public ROW or remain in place. The City shall provide written notice of any requirement to remove Grantee Facilities and shall provide Grantee sixty (60) days to comment on such requirement to move Grantee Facilities. Following consideration of such comments, the City Manager may issue an order requiring removal of Grantee Facilities within nine (9) months after such order is declared.

**Section 17. NONDISCRIMINATION.** Grantee shall provide service to electric light and power consumers in the City without discriminating against persons

based upon race, color, religion, sexual orientation, creed, or national origin, or, in accordance with Oregon law.

**Section 18. INDEMNIFICATION.** To the fullest extent permitted by law, Grantee shall indemnify and hold harmless the City against all claims, damages, costs and expenses, including attorney's fees and costs, to which the City may be subjected as a result of any negligent or willful misconduct of Grantee, or its affiliates, officers, employees, agents, contractors or subcontractors, arising out of the rights and privileges granted by this Franchise. The obligations imposed by this Section are intended to survive termination of this Franchise.

**Section 19. INSURANCE.** Grantee shall obtain and maintain in full force and effect, for the entire Term, the following insurance covering risks associated with Grantee's ownership and use of Grantee Facilities and the Public ROW:

(A) Commercial General Liability insurance covering all operations by or on behalf of Grantee for Bodily Injury and Property Damage, including Completed Operations and Contractors Liability Coverage, in an amount not less than Two Million Dollars (\$2,000,000.00) per occurrence and in the aggregate.

(B) Business Automobile Liability insurance to cover any vehicles used in connection with its activities under this Franchise, with a combined single limit not less than One Million Dollars (\$1,000,000.00) per accident.

(C) Workers' Compensation coverage as required by law and Employer's Liability Insurance with limits of \$1,000,000. With the exception of

Workers' Compensation and Employers Liability coverage, Grantee shall name the City as an additional insured on all applicable policies. All insurance policies shall provide that they shall not be canceled or modified unless thirty (30) days prior written notice is provided to the City. Grantee shall provide the City with a certificate of insurance evidencing such coverage as a condition of this Franchise and shall provide updated certificates upon request.

**(D) In Lieu of Insurance.** In lieu of the insurance policies required by this Section 19, Grantee may self-insure any and all of the coverage outlined in this Section 19. If Grantee elects to self-insure, it shall do so in an amount at least equal to the coverage requirements of this Section 19 in a form acceptable to the City. Grantee shall provide proof of self-insurance to the City before this Franchise takes effect and thereafter upon request by the City.

**Section 20. DAMAGE TO FACILITIES.** The City shall not be liable for any consequential damages or losses resulting from any damage to or loss of any facility as a result of or in connection with any work by or for the City unless the damage or loss is the direct and proximate result of willful, intentionally tortuous, negligent or malicious acts or omissions by the City, its employees, or agents. In such case, the City shall indemnify and hold harmless Grantee against all claims, damages, costs and expenses, including attorney's fees and costs, arising from such acts or omissions, subject to any applicable limitations in the Oregon

Constitution and the Oregon Tort Claims Act. The obligations imposed by this Section are intended to survive termination of this Franchise.

**Section 21. LIMITATION ON PRIVILEGES.** All rights and authority granted to Grantee by the City under this Franchise are conditioned on the understanding and agreement that the privileges in the Public ROW shall not be an enhancement of Grantee's properties or an asset or item of ownership of Grantee.

**Section 22. FRANCHISE NOT EXCLUSIVE.** This Franchise is not exclusive and shall not be construed to limit the City from granting rights, privileges and authority to other persons similar to or different from those set forth in this Franchise.

**Section 23. REMEDIES AND PENALTIES NOT EXCLUSIVE.** All remedies and penalties under this Franchise, including termination, are cumulative and not exclusive, and the recovery or enforcement by one available remedy or imposition of a penalty is not a bar to recovery or enforcement of any other remedy or imposition of any other penalty. The City reserves the right to enforce the penal provisions of any City ordinance or resolution and to avail itself to any and all remedies available at law or in equity. Failure to enforce any term, condition or obligation of this Franchise shall not be construed as a waiver of a breach of any term, condition or obligation of this Franchise. A specific waiver of a particular breach of any term, condition or obligation of this Franchise shall not be a waiver of any other subsequent or future breach of the same or any other term, condition or obligation of this Franchise.

**Section 24. SEVERABILITY CLAUSE.** If any section, subsection, sentence, clause, phrase, or other portion of this Franchise is, for any reason, held to be invalid or unconstitutional by a court of competent jurisdiction, all portions of this Franchise that are not held to be invalid or unconstitutional shall remain in effect until this Franchise is terminated or expired. After any declaration of invalidity or unconstitutionality of a portion of this Franchise, either party may demand that the other party meet to discuss amending the terms of this Franchise to conform to the original intent of the parties. If the parties are unable to agree on a revised franchise agreement within ninety (90) days after a portion of this Franchise is found to be invalid or unconstitutional, either party may terminate this Franchise by delivering one hundred and eighty (180) days notice to the other party.

**Section 25. ACCEPTANCE.** Within thirty (30 ) days after the ordinance adopting this Franchise is passed by the City Council, Grantee shall file with the City Recorder its written unconditional acceptance of this Franchise. If Grantee fails to do so, the City may withdraw this Franchise an any time prior to January 1, 2010. If the City elects not to withdraw this Franchise on or before January 1, 2010, the Grantee shall be deemed to accept the terms of this Franchise, whether or not a written acceptance has been filed with the City.

**Section 26. NOTICE.** Any notice provided for under this Franchise shall be sufficient if in writing and (1) delivered personally to the following addressee, (2) deposited in the United States mail, postage prepaid, certified mail, return receipt requested, (3) sent by overnight or commercial air courier (such as Federal Express or UPS), or (4) sent by facsimile transmission with verification of receipt,



addressed as follows, or to such other address as the receiving party hereafter shall specify in writing:

**If to the City: City Manager, City of Tualatin, Oregon**

**18880 SW Martinazzi**

**Tualatin, Oregon 97062**

**FAX # (503) 692-5421**

**With a copy to: City Attorney**

**City of Tualatin, Oregon**

**18880 SW Martinazzi**

**Tualatin, OR 97062**

**If to the Grantee: Regional Manager**

**Portland General Electric Company**

**2213 SW 153<sup>rd</sup> Drive**

**Beaverton, Oregon 97006**

**FAX: (503) 672-5595**

**With a copy to: Portland General Electric Company**

**Attn: General Counsel**

**One World Trade Center, 17<sup>th</sup> Floor**

**121 SW Salmon Street**

**Portland, Oregon 97204**

**FAX: (503) 464-2200**

Any such notice, communication or delivery shall be deemed effective and delivered upon the earliest to occur of actual delivery, three (3) business days

after deposition in the United States mail, one (1) business day after shipment by commercial air courier or the same day as confirmed facsimile transmission (or the first business day thereafter if faxed on a Saturday, Sunday or legal holiday).

**Section 27. EFFECTIVE DATE AND REPEAL OF PRIOR ORDINANCE.** This ordinance is effective on January 1, 2010. Ordinance No. 1038-99 is repealed, effective on January 1, 2010.

The parties, through their duly authorized representatives, have executed this franchise as of the dates indicated below.

PORTLAND GENERAL ELECTRIC

COMPANY CU

BY: Stephen Hawke

NAME: STEPHEN HAWKE

TITLE: SENIOR VICE PRESIDENT

DATE: 12-3-2009

CITY OF TUALATIN

BY: 

NAME: Lou Ogden

TITLE: Mayor

DATE: 11-23-09

ATTEST:

  
City Recorder